

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
NATIONAL SCIENCE AND TECHNOLOGY) FCC File No. D108068
NETWORK, INC.)
Licensee of Private Land Mobile Radio Station)
WPMJ456, Glendale, California)
)
FISHER WIRELESS SERVICES, INC.) FCC File No. C007248
Licensee of Private Land Mobile Radio Station)
WPNQ697, Running Springs, California)
)
HENRY RADIO, INC.)
Informal Petitions)
)
AMERICAN AUTOMOBILE ASSOCIATION)
Informal Complaint)
)
and)
)
MOBILE RELAY ASSOCIATES)
Licensee of Private Land Mobile Radio Stations)
WPHH415, La Crescenta, California, WPQF246,)
Palm Springs, California, WPQA973, Indio,)
California, WPPE290, Claremont, California,)
WPPE823, Escondido, California, WPPE824,)
Dulzura, California, WPPF223, Pasadena,)
California, and WPPF353, Poway, California)

ORDER ON RECONSIDERATION

Adopted: August 4, 2006

Released: August 7, 2006

By the Chief, Public Safety and Critical Infrastructure Division, Wireless Telecommunications Bureau:

1. Introduction. We have before us a petition for reconsideration filed by National Science and Technology Network, Inc. (NSTN), on July 2, 2003.1 NSTN seeks reconsideration of an order of the Wireless Telecommunications Bureau's former Public Safety and Private Wireless Division (Division)2 that modified NSTN's license for Station WPMJ456, Glendale, California.3 Specifically, the Division

1 Petition for Reconsideration of FCC Order of Modification Released June 4, 2003, filed July 2, 2003 (NSTN Petition).

2 The Commission reorganized the Wireless Telecommunications Bureau effective November 13, 2003, and the relevant duties of the Public Safety and Private Wireless Division were assumed by the Public Safety and Critical Infrastructure Division. See Reorganization of the Wireless Telecommunications Bureau, Order, 18 FCC Rcd 25414, 25414 ¶ 2 (2003).

3 National Science and Technology Network, Inc. Order of Modification, 18 FCC Rcd 11321 (WTB PSPWD 2003) (Order of Modification).

modified the license by altering its station class code from FB8 (centralized trunked)⁴ to FB6 (decentralized trunked).⁵ This action was taken pursuant to an earlier order proposing to modify NSTN's license, and affording NSTN an opportunity to object to the proposed modification.⁶ In its petition for reconsideration, NSTN contends that the Division improperly failed to hold a formal evidentiary hearing and that the procedures followed by the Division amounted to an abuse of discretion and a denial of due process. For the reasons stated below, we conclude that the Division acted in a procedurally correct manner, and accordingly deny NSTN's petition for reconsideration.

2. *Background.*⁷ In 1997, the Commission decided to permit centralized trunking in the private land mobile radio (PLMR) bands between 150 MHz and 512 MHz.⁸ The Commission emphasized that centralized trunking would be permitted only in those areas where exclusivity is recognized by the Commission or where an applicant/licensee has obtained the consent of all licensees whose service areas overlap a circle with a radius of seventy miles from the proposed trunked system's base station.⁹

3. The instant matter originated on May 14, 1998, when the American Automobile Association (AAA), an FCC-certified frequency coordinator for PLMR spectrum, filed an application on behalf of NSTN to operate in the centralized trunked mode in the 450 MHz band.¹⁰ NSTN received an authorization to operate centralized trunked Industrial/Business Station WPMJ456 on August 12, 1998. Approximately three months later, on November 5, 1998, the Industrial Telecommunications Association, Inc. (ITA), another FCC-certified PLMR frequency coordinator, filed an application on behalf of Fisher Wireless Services, Inc. (Fisher), requesting authorization for Fisher to operate in the decentralized trunked mode in the 450 MHz band.¹¹ In November 1998, NSTN filed an "informal petition" in which it requested the deletion of frequency pairs 452.3000/457.3000 MHz and 452.6500/457.6500 MHz from Fisher's application due to the close proximity of NSTN's use of the same frequencies in its operation of Station WPMJ456.¹²

4. In response to an FCC request to examine the frequency coordination and procedural issues surrounding the Fisher application, ITA submitted a frequency analysis demonstrating that on virtually every frequency at each of the four base station sites authorized for Station WPMJ456, there were

⁴ In a "centralized trunked system," the base station controller provides dynamic channel assignments automatically searching all channels in the system for, and assigning to a user, an open channel within that system.

⁵ In a "decentralized trunked system," which is also a system of dynamic channel assignment, the system continually monitors the assigned channels for activity both within the trunked system and outside the trunked system, and transmits only when an open channel is found.

⁶ See National Science and Technology Network, Inc., *Memorandum Opinion and Order*, 17 FCC Rcd 15728 (WTB PSPWD 2002) (*Modification MO&O*).

⁷ The background of this matter is set forth at greater length in the *Order of Modification*.

⁸ See Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services and Modify the Policies Governing Them, *Second Report and Order*, PR Docket No. 92-235, 12 FCC Rcd 14307, 14337-38 ¶¶ 56-59 (1997).

⁹ *Id.* In 1999, the Commission provided applicants with an alternate means of obtaining an authorization for a centralized trunked system by obtaining the concurrence of any existing co-channel or adjacent channel licensee whose 39 dBu service contour (UHF) or 37 dBu service contour (VHF) is intersected by the 21 dBu (UHF) or 19 dBu (VHF) interference contour of a proposed trunked station. See Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services and Modify the Policies Governing Them, *Third Memorandum Opinion and Order*, PR Docket No. 92-235, 14 FCC Rcd 10922, 10926-27 ¶¶ 6-9 (1999).

¹⁰ See FCC File No. 9805D108068 (filed May 14, 1998).

¹¹ See FCC File No. 9811C007248 (filed Nov. 5, 1998).

¹² Henry Radio Informal Petition, dated November 25, 1998.

multiple incumbent co-channel or adjacent channel licensees located within seventy miles of NSTN's base stations.¹³ As a result, ITA opined that Station WPMJ456 should never have received a "YG" (trunked) license.¹⁴ On February 10, 2000, Mobile Relay Associates (MRA), licensee of several PLMR stations located in the Los Angeles, California area, filed a letter in support of ITA's suggestion to modify the license for Station WPMJ456, stating that NSTN's license had been obtained through an "improper, defective coordination,"¹⁵ as MRA had three co-channel applications pending before the Commission at the time NSTN's application was coordinated by AAA.¹⁶

5. On June 26, 2000, the Division's Licensing and Technical Analysis Branch (Branch or LTAB) requested that AAA demonstrate the sufficiency of the frequency coordination conducted for Station WPMJ456.¹⁷ The Branch noted that although AAA indicated that it does not maintain frequency coordination records,¹⁸ Section 90.187(b)(2)(v) of the Commission's Rules¹⁹ requires trunked licensees to maintain letters of consent and to provide copies to the FCC upon request.²⁰ LTAB further noted that if AAA's coordination of Station WPMJ456 was not proven to be valid, LTAB would "institute a license modification proceeding."²¹ On July 21, 2000, AAA responded not by supplying the requested information, but by taking the position that it was "unreasonable" to ask it to recreate the "state of affairs" that existed in 1997 or 1998.²² On January 22, 2001, NSTN submitted to the Branch a letter challenging ITA's standing to contest NSTN's license for Station WPMJ456, and asserting that the license could not be revoked "absent a full trial before an administrative law judge."²³

6. On January 26, 2001, NSTN filed an informal petition requesting that the Commission cancel the licenses of eight stations licensed to MRA for "causing harmful co-channel interference to the users of [NSTN's] FB-8 [sic] YG trunked stations."²⁴ The Branch dismissed that petition on April 6, 2001.²⁵ On July 29, 2002, NSTN filed a petition for reconsideration of the Branch's dismissal.

¹³ See Letter dated June 16, 1999 from Mark E. Crosby, President/CEO of ITA, to Eric Smith, Commercial Wireless Division, Wireless Telecommunications Bureau, Federal Communications Commission at 1.

¹⁴ *Id.* at 1-2.

¹⁵ See Letter dated Feb. 10, 2000 from David J. Kaufman, counsel to MRA, to Herb Zeiler, Deputy Chief, Public Safety and Private Wireless Division.

¹⁶ See FCC File Nos. D103740, D104462, and D107518 (subsequently granted respectively under Call Signs WPPE290, WPHH415, and WPPF223).

¹⁷ See Letter dated June 26, 2000 from Steve Linn, Deputy Chief, on behalf of Mary Shultz, Chief, Licensing and Technical Analysis Branch, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau, to Elizabeth Sachs, counsel to Fisher (LTAB Letter).

¹⁸ See Letter dated Nov. 15, 1999 from Michele C. Farquhar, counsel to AAA, to Ronald B. Fuhrman, Deputy Chief, Technical Analysis Section, Commercial Wireless Division.

¹⁹ 47 C.F.R. § 90.187(b)(2)(v).

²⁰ LTAB Letter at 1 n.1.

²¹ *Id.* at 1-2.

²² See Letter dated July 21, 2000 from Gary Ruark, Frequency Coordinator, AAA, to Mary Shultz, Chief, Licensing and Technical Analysis Branch, Public Safety & Private Wireless Division, Wireless Telecommunications Bureau.

²³ Letter dated January 22, 2001 from Alan M. Lurya, counsel to NSTN, to Mary Shultz, Chief, Licensing and Technical Analysis Branch, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau

²⁴ Letter from Alan Lurya, counsel to NSTN, to Mary Shultz and Steve Linn, Chief, Licensing and Technical Analysis Branch, Public Safety and Private Wireless Division, Federal Communications Commission, filed Jan. 26, 2001; see also Letter from Alan Lurya to Mary Shultz and Steve Linn, Chief, Licensing and Technical Analysis Branch, Public Safety and Private Wireless Division, Federal Communications Commission, filed Feb. 2, 2001.

7. On August 9, 2002, the Division proposed to modify NSTN's license for Station WPMJ456 by changing its station class code from a centralized trunked station (station class FB8) to a decentralized trunked station (station class FB6).²⁶ The Division concluded that the original NSTN application should not have been coordinated or granted because it did not provide the requisite interference protection to several existing stations and pending applications, and there was no record that any of the required consents were obtained.²⁷

8. On September 9, 2002, NSTN filed a petition protesting the proposed license modification.²⁸ In its protest, NSTN made two arguments why the license for Station WPMJ456 should not be modified.²⁹ First, NSTN claimed that the frequency coordination performed for the Fisher application was "improper due to the congestion of the relevant frequencies."³⁰ Second, NSTN pointed to its reliance on the Commission's grant of its license and stated that it would "suffer grievous injury as a result of any change in status of the license."³¹ The Division rejected both arguments.³² Consequently, the Division modified NSTN's license for Station WPMJ456 by altering its station class code from FB8 to FB6. In addition, the Division dismissed as moot NSTN's petition for reconsideration of the Branch's dismissal of NSTN's informal petition requesting that the Commission cancel MRA's licenses, because the petition was premised on Station WPMJ456 having FB8 status.³³ On July 2, 2003, NSTN filed the instant petition for reconsideration of the Division's decision.³⁴

9. *Discussion.* NSTN states that the modification of its license changing the station class from FB8 to FB6 is the equivalent of a license revocation, because it rendered the license economically valueless. NSTN therefore argues that it was entitled to a formal hearing prior to such action, pursuant to Section 312 of the Communications Act of 1934, as amended (the Act).³⁵ It also argues that the Division was prohibited from taking any action with respect to the license once the grant became final. As set forth below, we find these arguments unpersuasive.

(...continued from previous page)

²⁵ See Letter dated Apr. 6, 2001 from Mary Shultz, Chief, Licensing and Technical Analysis Branch, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau, Federal Communications Commission to Alan M. Lurya.

²⁶ *Modification MO&O*, 17 FCC Rcd at 15734 ¶ 19.

²⁷ *Id.* at 15734 ¶¶ 16-17.

²⁸ Protest of Proposed License Modification, filed Sept. 9, 2002.

²⁹ *Id.* at 4.

³⁰ *Id.* at 5.

³¹ *Id.* at 6.

³² With respect to the first argument, the Division concluded that NSTN had not provided any legal or technical support for its contention that the frequencies were fully occupied; and, even if the frequencies were fully occupied, the argument failed to address the Division's conclusion that NSTN's application was improperly granted. *Order of Modification*, 18 FCC Rcd at 11325-26 ¶ 12. With respect to the second argument, the Division concluded that the effect of the proposed modification on NSTN did not outweigh the benefits, because it would be more equitable to modify NSTN's license than it would be to completely bar Fisher and MRA from operating on the subject frequencies. *Id.* at 11326 ¶ 13. In any event, we note that NSTN failed to explain and document how it would be injured.

³³ *Id.* at 11326 ¶ 14.

³⁴ MRA filed an opposition on July 15, 2003. Opposition to Petition for Reconsideration, filed July 15, 2003 (Opposition). NSTN filed a reply on July 25, 2003. Reply to Opposition of Mobile Relay Associates (MRA), filed July 25, 2003 (Reply).

³⁵ 47 U.S.C. § 312.

10. First, NSTN contends, “The modification . . . is actually the economic equivalent of revocation. The Order destroys an FB8 license which has substantial economic value, as it is an exclusive license, and puts in its place a valueless FB6 license, which is economically worthless because it enjoys no effective protection from harmful co-channel interference.”³⁶ We disagree. License modification is not the equivalent of license revocation, even if the modification reduces the station’s utility in the licensee’s perspective.³⁷ NSTN is still authorized to operate Station WPMJ456. The imposition of a monitoring requirement neither revokes the license nor renders it valueless.³⁸ Thus, a Section 312 revocation hearing was not required under the circumstances presented.

11. Rather, this matter is governed by Section 316 of the Act.³⁹ Section 316, as implemented by Section 1.87 of the Commission’s Rules,⁴⁰ provides that the Commission may modify a license to promote the public interest, convenience, and necessity, but no such order of modification will become final until the licensee is provided an opportunity to protest the proposed modification.⁴¹ It also provides that, if a hearing is conducted, the burden of proof shall be upon the Commission.⁴² Contrary to NSTN’s assertions,⁴³ Section 316 does not provide for an automatic right to a formal hearing prior to license modification.⁴⁴ Rather, to warrant an evidentiary hearing, the licensee’s protest “must . . . set forth a substantial and material question of fact,”⁴⁵ *i.e.*, specific allegations of fact sufficient to show that the action would be *prima facie* inconsistent with the public interest, convenience and necessity.⁴⁶ Only if this *prima facie* case is made must the Commission proceed to the second level of inquiry and determine whether the totality of the evidence arouses sufficient doubt that further inquiry to determine the facts is necessary.⁴⁷

12. As noted above, the Division concluded in the order proposing modification that NSTN’s application for Station WPMJ456 should not have been granted because it did not provide the requisite interference protection to existing stations and pending applications. NSTN had the same opportunity, as

³⁶ NSTN Petition at 9; *see also* Reply at 3.

³⁷ *See* Pacific Gas and Electric Company, *Memorandum Opinion and Order*, 18 FCC Rcd 22761, 22765 ¶ 11 (2003) (concluding that modifying a license by reducing the base transmitter power did not constitute a revocation); *see also* Review of Spectrum Sharing Plan among Non-Geostationary Satellite Orbit Mobile Satellite Service Systems in the 1.6/2.4 GHz Bands, *Report and Order, Fourth Report and Order and Further Notice of Proposed Rulemaking*, IB Docket No. 02-364, 19 FCC Rcd 13356, 13395 ¶ 89 (2004) (rejecting assertion that changing the Big LEO channel plan constituted a revocation rather than a modification).

³⁸ Indeed, a review of the Commission’s Universal Licensing System database indicates that forty-seven of NSTN’s sixty-four other licenses (excluding Station WPMJ456) for base station operations list frequencies authorized on an FB6 basis. Thus, it appears that NSTN does in fact place some value on an FB6 license.

³⁹ 47 U.S.C. § 316.

⁴⁰ 47 C.F.R. § 1.87.

⁴¹ 47 U.S.C. § 316(a); 47 C.F.R. § 1.87(a).

⁴² 47 U.S.C. § 316(b); 47 C.F.R. § 1.87(e).

⁴³ *See, e.g.*, NSTN Petition at 3.

⁴⁴ Modification of FM or Television Licenses Pursuant to Section 316 of the Communications Act, *Order*, 2 FCC Rcd 3327, 3327 ¶ 1 (1987) (*Section 316 Order*).

⁴⁵ *Id.* at 3327 ¶ 5.

⁴⁶ *See, e.g.*, *Serafyn v. FCC*, 149 F.3d 1213 (D.C. Cir. 1998) (*Serafyn*); *Gencom Inc. v. FCC* 832 F.2d 171, 180-81 (D.C. Cir. 1987); *Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 394-95 (D.C. Cir. 1985) (*Citizens for Jazz on WRVR*).

⁴⁷ *Section 316 Order*, 3 FCC Rcd at 3327 ¶ 5; *Citizens for Jazz on WRVR*, 775 F.2d at 394-95.

AAA had previously, to explain how the application complied with the Commission's rules, but NSTN's protest did not raise any question of fact concerning whether NSTN obtained the requisite concurrences or otherwise provided the required interference protection. Rather, NSTN argued that changing the class of its station would not be in the public interest because: (1) the Bureau had not resolved another reconsideration proceeding where the matter of overlapping licenses was at issue; and (2) the modification would cause severe hardship to users of NSTN's system. In the *Order of Modification*, the Division addressed the arguments NSTN did raise and found that the proposal raised no significant issues of fact. It further found that a formal hearing was not warranted to address NSTN's issues.⁴⁸

13. Again, in its instant petition for reconsideration, NSTN fails to present any specific allegations of fact different from those relied on by the Division in reaching its decision. Moreover, NSTN has not presented any evidence that a factual issue exists that might warrant a formal hearing or an affidavit⁴⁹ in support of the facts it does allege.⁵⁰ As courts have held, the standard for making out a *prima facie* case "in effect says that the Commission must look into the possible existence of a fire only when it is shown a good deal of smoke."⁵¹ In this case, NSTN provides no allegations or evidence of any factual "smoke" in the modification proceeding.

14. Finally, NSTN argues that the Division's action was untimely, because "NSTN's FB8 license became incontestable thirty days from date of grant, except by the institution of formal revocation proceedings."⁵² This is incorrect. Relevant authority clearly establishes that the Commission's authority to modify licenses under Section 316 is not limited in time or to the correction of post-licensing events.⁵³

15. ACCORDINGLY, IT IS ORDERED, pursuant to Sections 4(i), 316, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 316, and 405, and Sections 1.87 and 1.106 of the Commission's Rules, 47 C.F.R. §§ 1.87 and 1.106, that the Petition for Reconsideration filed by the National Science and Technology Network, Inc. on July 2, 2003, IS DENIED.

⁴⁸ In addition, we note that NSTN did not request a hearing in the protest it submitted to the Division, and thus may be deemed to have waived any right to a hearing. See 47 C.F.R. § 1.87(h). As noted above, although NSTN asserted to the Branch that its license could not be revoked without a hearing, that claim was irrelevant because, as explained, *supra*, NSTN's license was not revoked.

⁴⁹ Under Section 316(a)(3), protests shall contain specific allegations of fact supported by affidavit of a person or persons with personal knowledge thereof, except for facts of which official notice may be taken. See 47 U.S.C. § 316(a)(3); 47 C.F.R. § 1.87(d).

⁵⁰ In its reply to MRA's opposition to its petition for reconsideration, NSTN appears to contest the Division's conclusion that modifying the license for Station WPMJ456 would serve the public interest. It states, "This decision puts the health and safety of the public at risk. Many of NSTN's customers are engaged in emergency response activities, which directly affect public health and safety. For example, there are several paramedic ambulance companies who are users of the system." Reply at 4. This is not sufficient to raise a factual issue based on the record thus far established in this proceeding. NSTN does not quantify the number of emergency responders using its system, or explain how the use of decentralized trunking instead of centralized trunking would impair their operations, or compare the composition of its users with that of MRA's and Fisher's users.

⁵¹ *Citizens for Jazz on WRVR, Inc.*, 775 F. 2d at 397; see also *Serafyn*, 149 F. 3d at 1220.

⁵² NSTN Petition at 9.

⁵³ *California Metro Mobile Communications, Inc. v. FCC*, 365 F. 2d 38, 45 (D.C. Cir. 2004) (concluding that "section 316 'contains no limitation on the time frame within which [the Commission] may act to modify a license' and that its action under the section 'is not subject to the limitations on revocation, modification or reconsideration imposed by [s]ection 405'" (citations omitted); see, e.g., Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems, *Eighth Report and Order, Fifth Notice of Proposed Rule Making and Order*, ET Docket No. 00-258, 20 FCC Rcd 15866, 15877 n.62 (2005).

16. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

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